

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

RATE ADJUSTMENT DUE TO)
EXTRAORDINARY OR EXCEPTIONAL) Docket No. R2013-10R
CIRCUMSTANCES)

**INITIAL COMMENTS OF THE ASSOCIATION FOR POSTAL COMMERCE,
ALLIANCE OF NONPROFIT MAILERS, MAJOR MAILERS ASSOCIATION,
MPA—THE ASSOCIATION OF MAGAZINE MEDIA, AND
NATIONAL POSTAL POLICY COUNCIL
IN RESPONSE TO ORDER NO. 2586
(August 17, 2015)**

Pursuant to Order No. 2586, the Association for Postal Commerce (“PostCom”), the Alliance of Nonprofit Mailers (“ANM”), Major Mailers Association (“MMA”), MPA—The Association of Magazine Media (“MPA”), and the National Postal Policy Council (“NPPC”) (collectively, “PostCom, *et al.*”) submit these comments on the Commission’s proposed standard for determining whether a change in mail preparation requirements has rate effects with price cap implications. The Commission has properly recognized that the Court of Appeals’ remand order can be satisfied by an appropriate standard for excluding consideration of rule changes with rate effects that are merely *de minimis*. The specific standard proposed by the Commission, however, is too complex and involves elements that will not assist mailers, the Postal Service, and the Commission in differentiating between changes to mail preparation requirements that do and do not have rate effects with price cap implications. A workable alternative standard, based on the Commission’s existing rules governing *de minimis* rate changes, would be preferable and should apply to the issue remanded to the Commission.

I. THE COMMISSION'S TASK ON REMAND

The scope of the court's remand in *United States Postal Service v. Postal Regulatory Commission* is narrow: "enunciate an intelligent standard" for when a change in mail preparation requirements amounts to a rate adjustment requiring a demonstration of compliance with the Commission's price cap regulations, then apply that standard to the mandatory Full Service IMb requirement at issue in R2013-10. 785 F.3d 740, 756 (D.C. Cir. 2015). The court remanded this case because the Commission's stated standard—whether the change in preparation requirements would require mailers to "alter a basic characteristic of the mailing" to continue receiving the same rate—did not provide a principled and workable way to distinguish between changes that would and would not require the Postal Service to demonstrate cap compliance.

Importantly, the court upheld the basic premise of the Commission's decision in Order No. 1890, that the Commission has the authority "to consider mail preparation requirement changes in the [Domestic Mail] Manual as 'changes in rates' that count against the price cap." *USPS*, 785 F.3d at 751. In fact, the court described as "self-evident" the "fact that changes in classifications can *cause* changes in the rates paid by mailers." *Id.* at 752 (emphasis in original).

The court recognized, however, that this principle "could have broad consequences for the Postal Service" by permitting the Commission to "superintend not only the changes in posted rates listed in the Mail Classification Schedule, but also any of the myriad operational changes that reclassify mailpieces and have 'rate effects.'" *Id.* at 24. Acknowledging the Commission's stated intent to "not indiscriminately treat all new mail preparation requirements as rate adjustments," the court concluded the Commission failed "to set forth a standard that will ensure this promise is kept." *Id.* (internal quotation omitted). The court specifically highlighted the Commission's inability to identify a principle that could distinguish between the Postal Service's

Full Service IMb requirement, which the Commission held did constitute a change in rates requiring price cap compliance, and changes to the bundling rules for flat-shaped pieces, which it held did not. The court explained that “[w]hile the Commission may well be able to determine a basis for treating the Intelligent Mail rule and the bundling rule differently, it has not enunciated that basis in this case or provided guidance for future cases.” *Id.* at 27.

Ultimately, the flaw in Order No. 1890 was the Commission’s failure to establish a reasonable limiting principle for its power to oversee mail preparation changes. The establishment of such a limiting principle is essential. All changes to mail preparation requirements can be viewed as changes in rates to the extent they impose costs on mailers or change eligibility for specific rates. The Postal Service, the Commission, and mailers all recognize, however, that it is impracticable and undesirable for the Postal Service to file a notice of rate change with the Commission every time the Postal Service makes a change to the DMM or otherwise modifies preparation and eligibility requirements. But at the same time, the Postal Service cannot be permitted to impose *de facto* rate increases on mailers by imposing onerous mail preparation requirements that require mailers to choose between entering mail at higher rates as currently prepared or making significant investments to comply with the new requirements to maintain access to the current rate.

The Commission’s task, then, is to articulate a standard that reasonably differentiates between situations where a change in mail preparation requirements has a significant enough effect on the rates mailers will pay to warrant treating the change as a change in rates subject to the price cap requirements, and those minor changes in mail preparation requirements that have a trivial effect on rates, and apply that standard to the facts of this case. As we discuss below, such a standard can be crafted from the Commission’s existing rules on *de minimis* rate changes (and,

as PostCom explains in a separate petition for rulemaking, augmented with some procedural adjustments to help apply the standard in future cases). First, however, it is necessary to explain why the test proposed by the Commission does not satisfy the court's remand.

II. THE COMMISSION'S PROPOSED STANDARD MUST BE REVISED

The Commission proposes a four-factor test, with multiple subparts, for determining when a change in mail preparation requirements amounts to a rate change:

In conducting its analysis of whether a mail preparation change constitutes a rate change, the Commission will evaluate the following four factors: (1) whether the change alters a basic characteristic of a mailing, (2) the effect of the change on mailers, (3) the purpose of the change, and 4) whether the change results in a shift in volume of mail from one rate category to another.

Order No. 2586 at 3-4. This test does not meet the court's requirement that the Commission set forth an articulable principle for distinguishing between mail preparation changes with and without rate effects.

The central inquiry for the Commission in evaluating changes in mail preparation requirements with rate effects is whether the change will impose significant enough costs on mailers that the rate effect of the change should be evaluated as an increase in rates. The key consideration is the postage or other costs imposed on mailers. If the new preparation requirements will require mailers to pay higher postage or incur significant additional costs to maintain the same postage rates, the change is effectively a rate change. The Commission's task, directed by the court, is to draw the line between trivial changes to preparation requirements and those that impose costs significant enough to warrant evaluation as a change in rates. The Commission's proposed test cannot fulfill this task because it encompasses factors that are either irrelevant to the analysis of the significance of the change's rate effect or are not sufficiently defined—especially in the absence of any indication of how they would be applied to particular facts of this case—to provide the necessary guidance.

The first factor—“whether the change alters a basic characteristic of the mailing”— was the sole factor relied on by the Commission in Order No. 1890, and the factor the court held arbitrary and capricious. *USPS*, 785 F.3d at 750, 754. Specifically, the court held that this standard “is not accompanied by an adequate explanation of how the standard applies to the facts of this case” and “is indiscriminate and offers no meaningful guidance to the Postal Service or its customers on how to treat future changes to mail preparation requirements.” *Id.* The Commission’s reformulation of this standard does not resolve these flaws.

First, the Commission has given no indication of “how the standard applies to the facts of this case.” This oversight is problematic because, without applying the factor to the facts, the characteristics the Commission enumerates do not lend sufficient substance to the factor. Significant questions remain: What level of change in the presentation or preparation of a mailing is “substantial”? What “magnitude” of change would result in a change to a basic characteristic of the mailing? How complex must changes relating to mailer behavior be before they alter a basic characteristic? On its face, the Commission’s revised test provides no more guidance than the test announced in Order No. 1890.

Second, the factor contains considerations irrelevant to the central issue of the increase in *de facto* postage costs the change will cause. For instance, it is unclear how characteristic (c), “regularity of the change (periodic vs. one-time),” relates to whether the change alters a “basic characteristic” of the mailing. It seems a basic characteristic could be altered periodically or one time; either way, it would be altered.

Moreover, several of the characteristics the Commission intends to weigh when deciding whether a proposed change alters a basic characteristic of a mailing can be easily subsumed into other factors of the Commission’s test. Whether the change modifies the size, weight, or content

of eligible mail, and whether the change alters the presentation and/or preparation of mail in a substantial way, will likely determine whether the change results in a shift in mail volume from one rate category to another (factor 4). The magnitude of the change and the complexity of the change relating to mailer behavior go to the effect of the change on mailers (factor 2).

For these reasons, the factor of “whether the change alters a basic characteristic of a mailing” does not provide guidance as to whether a change in mail preparation requirements amounts to a change in rates through the redefinition or deletion of a rate cell.

Similarly, factor (3), “the purpose of the change,” has no bearing on whether the proposed change has rate effects significant enough to require the Postal Service to file a notice of rate change with the Commission. The Postal Service’s intent is irrelevant; the only question should be whether the proposed change has the *effect* of a rate increase. Not only is the Postal Service unlikely to admit that the purpose of a change to mail preparation requirements is to increase rates, but even if it genuinely does not intend to raise rates through the change, the unintended effect of the change may be to increase the rates mailers must pay. In such a case, the proposed rule change should still be treated as a rate increase, even if the increase was unintended. Whether the change results in a rate increase is entirely independent of whether the rule furthers some other Postal Service purposes such as improving the expeditious collection of mail or aligning practices with Postal Service equipment. In the present case, it is likely that neither the Full Service IMb requirement nor the Flats bundling requirement were intended to be price increases, and both requirements were intended to improve efficiency and align mailing processes with Postal Service equipment. In fact, in absence of bad faith on the part of the Postal Service, it is difficult to conceive of a rule change that would not have at least the colorable goal

of improving efficiency somewhere within the postal network. The Commission should, therefore, examine only the effect of the proposed change, not its intent.

The two remaining factors of the Commission's proposed test—the effect of the change on mailers (factor 2) and whether the change results in a shift in volume of mail from one rate category to another (factor 4)—are relevant considerations and can form the basis of a reasonable, objective test. The Commission must better define these factors, however, if they are to meaningfully guide the Commission's decisionmaking.

With respect to factor 2, the Commission states it will evaluate:

(a) whether the change imposes fixed or variable costs, (b) the effect on high volume and low volume mailers, (c) the number of mailers affected, (d) the volume of mail affected, (e) the benefits to mailers, and (f) the timeframe for mailers to comply with the change.

Order. No. 2586 at 4. While the Commission is right to consider the effect of the change on mailers, the considerations it has enumerated do not capture the key consideration: whether the proposed change will impose additional direct or *de facto* postage increases on mailers by requiring them either to enter their mail at a higher rate or expend significant amounts of money to modify their mailings to continue qualifying for the current rate.

Of the six elements the Commission has indicated it will evaluate to determine the effect of a mail preparation change on mailers, only one is relevant to whether the proposed change amounts to rate increase: the volume of mail affected. The others are, at best, tangentially related. For instance, the first element, whether the change imposes fixed or variable costs, relates to whether mailers will incur additional costs as a result of the change. But it is not clear why it would matter whether those costs are fixed or variable. Nor is it apparent whether a change that imposed fixed, as to variable costs, would be more or less likely to have rate effects. Likewise, the effect on high volume and low volume mailers and the number of mailers affected

matter only to the extent they impact the volume of mail affected. Further, it is not clear why a change that would have benefits to mailers could not also be change with a rate effect. And the timeframe for mailers to comply with the change is relevant only to the extent it increases or decreases the costs mailers must bear as a result of the change.

The Commission's fourth factor, while certainly relevant to the inquiry, should also be better defined. The question of "whether the change results in a shift in volume of mail from one rate category to another" is of central importance. But alone, it is insufficient. The Commission defines this factor as whether the proposed change in preparation requirements would "result in the *de facto* elimination of a rate category or the deletion of a rate cell." But a rule change that would result in a large share (but not all) of the current volume of a rate cell shifting to a more costly rate cell would "result in a shift in volume of mail" without necessarily resulting in "the *de facto* elimination of a rate category or the deletion of a rate cell." Additionally, if a proposed change would eliminate a rate category or delete a rate cell, the Postal Service already must account for that change in its CPI calculations under 39 C.F.R. § 3010.23(d)(2). The Commission's task in the present docket is to determine *when* a rule change would result in sufficient volume shifting from a rate category to warrant treating the change as the elimination or redefinition of a rate category. This factor, as stated by the Commission, does not assist in resolving this issue.

III. PROPOSED ALTERNATIVE TEST

The discussion above shows that the test proposed by the Commission is unnecessarily complex and unlikely to enable the Postal Service, mailers, and the Commission to distinguish between mail preparation changes which do and do not have significant rate effects. Instead, the standard should focus on the key consideration of whether the change in preparation

requirements imposes significant enough costs on mailers to maintain eligibility for a rate that the change should be considered a *de facto* rate increase. PostCom *et al.* suggest that the Commission's existing rules governing *de minimis* rate changes can fulfill this function.

First, it is helpful to examine how a change in mail preparation requirements could result in a rate increase. As an example, if the Postal Service increased the minimum bundle size from 6 to 20 pieces to qualify for a particular piece rate, bundles of 6 pieces would no longer qualify for the rate, and would presumably need to be entered at a higher rate. This requirement would cause mail prepared in 6-piece bundles to shift from one rate category to another (or, in the terminology of the Commission's regulations, it would either eliminate the rate cell for 6-piece bundles or redefine it as a 20-piece bundle cell).

Second, it is important to reiterate that any change in mail preparation requirements that causes mail volume to shift from one rate category to another is a rate change. Further, as the court recognized, the magnitude of the change in preparation requirements does not determine *whether* there is a change in rates, only *how much* the rate will change. *USPS*, 785 F.3d at 755. As an example, if the Postal Service issued a rule changing the size of the required clear field to be eligible for automation mail, this change, though small, would still have a rate effect. Mailings entered with text within the adjusted clear field would no longer be eligible for the automation rate. While this definition of a rule change with a rate effect may seem expansive, it actually will aid in the development of a reasoned principle for determining when the Postal Service must file a notice of rate change. By simplifying the definition of a rule change with a rate effect, the Commission can focus its inquiry on the key question: whether the resulting rate change is significant enough to be accounted for in rate adjustment calculations.

Fortunately, the Commission already has regulations in place to govern this determination. The Commission has established rules governing *de minimis* rate changes at 39 C.F.R. § 3010.30. These rules state that the Postal Service may “file a Type 1-A rate adjustment as a *de minimis* rate increase if . . . the rate increases contained within the notice . . . do not result in the percentage change in rates for the class equaling or exceeding 0.001 percent.” 39 C.F.R. § 30130(a)(1). There is no reason that actual or *de facto* rate increases resulting from changes to mail preparation requirements should be treated any differently, and this rule can be easily applied to changes in mail preparation requirements. If the total postage revenue increase for the class affected by the rule change is below the *de minimis* threshold, the change need not be accounted for in rate adjustment calculations, and the Postal Service need not file a notice of rate adjustment along with the change in mail preparation requirements. This result could obtain if the proposed change affects a small volume of mail, or if the rate for which the mail is eligible after the change is not appreciably higher than the original rate.

Similarly, the *de minimis* standard can be applied to the costs mailers would incur to comply with the new rule and continue to qualify for the same rate category. That is, even if the proposed change would cause a large volume of mail to shift to a higher rate category if mailers did not change their mail preparation practices, compliance costs may be so minimal that any *de facto* rate increase would be *de minimis*. The example of the change in the clear field requirement, discussed above, would likely fall into this category. Because compliance would be simple and low-cost, the likely effect of the rule change would be that mailers’ rates of postage would not increase, and any increase in preparation costs as a percentage of the rate would be *de minimis*.

This standard has the benefit of being objective and simple to administer. Further, because it relies on existing Commission regulations, it can be readily implemented. PostCom, *et al.* expect that most routine changes to mail preparation requirements would fall within this *de minimis* exception, and the implementation of this standard would not significantly intrude on the Postal Service's prerogative to govern its operations. We are confident that application of the test set forth in these comments will both support the decision the Commission reached regarding the Full Service IMb requirement and satisfy the Court's concerns that there be a clear rationale for distinguishing trivial rate effects from those which do not deserve Commission scrutiny.

While no changes to the Commission's rules are necessary to apply this standard in the current docket, the Commission may wish to consider modifications to its rules to implement this standard for future rule and rate changes. In a petition for rulemaking filed today, PostCom suggests changes to the Commission's rules which would assist it in applying this standard in future cases.

IV. CONCLUSION

While PostCom, *et al.* appreciate the difficulty of the Commission's task on remand, the standard proposed in Order No. 2586 for determining when a change in mail preparation requirements results in a *de facto* rate increase significant enough to warrant inclusion of the rate effect of the change in price cap compliance calculations does not fulfill the requirements of the court's remand. The fact is, all changes to mail preparation requirements are, in some sense, rate changes. The question for the Commission is when these rate effects are significant enough to warrant including them in price cap calculations. Instead of developing a complex, multi-factor test, the Commission should look to its existing rules, which already recognize the need to allow

the Postal Service flexibility to make minor changes in rates. By applying the *de minimis* standard of 39 C.F.R. § 3010.30, the Commission can simply and effectively ensure that changes to mail preparation requirements will not result in material rate increases without unduly inserting itself into the Postal Service's design of its operational standards.

Respectfully submitted,

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